UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA

In re: Case No. 04-30398-GFK
Chapter 13

Dianna Lynn Smith,

Debtor(s).

NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY

- TO: Debtor(s) and Attorney for Debtor(s); Jasmine Keller, Chapter 13 Trustee; U.S. Trustee; and other parties in interest.
- 1. Wells Fargo Financial Acceptance, a secured creditor of Debtor(s), by its undersigned attorney, moves the Court for the relief requested below, and gives notice of hearing herewith.
- 2. The Court will hold a hearing on this motion at **10:30 am** on **Monday, October 25, 2004**, before the Honorable Gregory F. Kishel, in Courtroom No. 228B, at the U.S. Federal Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.
- 3. Any response to this motion must be filed and delivered not later than Wednesday, October 20, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than Thursday, October 14, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
- 4. This motion arises under 11 U.S.C. § 362 and Fed. R. Bankr. P. 4001. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9006-1, 9013-1 through 9013-3. Wells Fargo Financial Acceptance seeks relief from the automatic stay of 11 U.S.C. § 362 with respect to certain personal property owned by Debtor(s).

- 5. The petition commencing this Chapter 13 case was filed on January 26, 2004 and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(a), Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding.
- Wells Fargo Financial Acceptance holds a valid, perfected interest in a 1999 Suzuki Grand
 Vitara, vehicle identification number JS3TD62V8X4113048 (the "Vehicle").
- 7. Copies of Wells Fargo Financial Acceptance's agreement with Debtor(s) (the "Contract") and evidence of perfection of Wells Fargo Financial Acceptance's interest in the Vehicle are attached hereto as Exhibits A and B and incorporated herein by reference.
- 8. The Chapter 13 Plan requires direct payments to Wells Fargo Financial Acceptance. On information and belief, a delinquency under the Plan exists for the months of July through October 2004 totaling at least \$1,145.10.
- 9. The balance due under the Contract is \$6,363.57 as of the date hereof. On information and belief, the fair market value of the Vehicle is approximately \$6,925.00.
- 10. The failure of the Debtor(s) to make payments pursuant to the Chapter 13 Plan or otherwise provide Wells Fargo Financial Acceptance with adequate protection of its interest in the Vehicle constitutes cause, within the meaning of 11 U.S.C. § 362(d)(1) and 362(d)(2), entitling Wells Fargo Financial Acceptance to relief from the stay.
- 11. Wells Fargo Financial Acceptance requests that any order modifying the automatic stay be effective immediately as allowed under Federal Bankruptcy Rule 4001(a)(3).
- 12. If testimony is necessary as to any facts relevant to this motion, D. Wyant, or some other representative of Movant, will testify on behalf of Wells Fargo Financial Acceptance.
- 13. This notice of motion and motion also serves as notice of default as may be required by Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232 (Minn. 1980). If the default is not cured before

the hearing, Wells Fargo Financial Acceptance will repossess the Vehicle promptly upon the Court

signing the Order.

14. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION

OBTAINED WILL BE USED FOR THAT PURPOSE.

WHEREFORE, Wells Fargo Financial Acceptance respectfully moves the Court for an order: (i)

modifying the automatic stay of 11 U.S.C. § 362 so as to permit Wells Fargo Financial Acceptance to

foreclose its interest in the Vehicle in accordance with Minnesota law, (ii) finding that Bankruptcy Rule

4001(a)(3) of the Federal Rules of Bankruptcy Procedure is not applicable, and (iii) granting such other

relief as may be just and equitable.

Dated: October 6, 2004

STEWART, ZLIMEN & JUNGERS

By /e/ Bradley J. Halberstadt

Bradley J. Halberstadt (#215296)

Attorneys for Movant

430 Oak Grove Street, Ste. 200

Minneapolis, Minnesota 55403

(612) 870-4100

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UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA

In re:

Chapter 13 Case

Dianna L. Smith,

Bky, No. 04-30398-GFK

Debtor(s).

Affidavit of Darin Wyant

I, Darin Wyant, of Wells Fargo Financial Acceptance, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. Wells Fargo Financial Acceptance has a security interest in the following (the "Collateral"):

1999 Suzuki Grand Vitara VIN# JS3TD62V8X4113048.

- \$6,363.57 is the outstanding balance under the contract as of October 6, 2004.
- \$1.145.10 is the amount of the existing delinquency under the contract.
- 4. \$6,925.00 is the fair market value of the Collateral.
- 5. Yes Appropriate insurance has been verified.
- 6. NA is the payment default under the Chapter 13 Plan.

Further your affiant sayeth not.

Dated:

10/6/2004

Darin Wyant

Bankruptcy Specialist

Wells Fargo Financial Acceptance

Subscribed and sworn to before me on October

otary

JENNIFER SUE ELIASON : NOTARY PUBLIC-MINNESOTA My Commission Explice Jan. 31, 2008

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TOUR PROMISE TO PAY AND THE TERMS OF REPAYMENT. To repay your inon, you promise to gay us the amount of the control of the con

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ADDITIONAL TERMS. The additional same printed on pages 2 and 3 are a part of this Note and Society Agreement, and you are bound by them in the case manner as if sow were printed on page 1 or this Note and Society Agreement, and you are bound by them in the case manner as if they were printed on page 1 or this Note and Society Agreement, place cipy your manner below, All parents against this Note and Society agreement, place cipy your manner below, All parents against this Note and Society agreement will be tully responsible for paying it in full, by signing below, you are authorizing destursement of the loss processes as shown stowed in the "terms into a Association of Associ

(SIEN REAE') COLLATERAL CWARR'S OPANT OF A SECURITY INTEREST butts interest, the sort you make a day one wise stong belies. Top words were to from one described agreement, you got us a socially interest in the property SIGN NERS

04/02/03

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AINVESOTA DEPARTMENT OF PUBLIC SAFETY
SERVER & VEHICLE SERVICES DIVISION
SERVER & VEHICLE SERVICES DIVISION
OF THE SERVICES DIVISION
OF THE PERFECTION DESTOR NAME AND ADDRESS

SMITH DIANNA LYNN 1871 REAMEY AVE OAKDALE MN 55119

PAID Permit No. 171 St. Paul, MN

SUZI HWGVT JSSTD62V8X4113048 04/02/03 H1270K551 RETAIN THIS DOCUMENT - See reverse side of this form for reproving this lien.

1ST SECURED PARTY

CRAZS

LIEN HOLDER

WELLS FARGO FIN ACCEPT 1350 E HWY 96 WHITE BEAR LAKE MN 55110-3603

UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA

Dianna Lynn Smith,

In re:

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM STAY

Case No.04-30398-GFK

Chapter 13

Debtor(s).

Wells Fargo Financial Acceptance submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Wells Fargo Financial Acceptance holds a perfected interest in a 1999 Suzuki Grand Vitara with a vehicle identification number JS3TD62V8X4113048 (the "Vehicle"). Payments due under the terms of the Chapter 13 Plan totaling \$1,145.10 have not been made by the Debtor(s). The balance due under the Contract is \$6,363.57 as of the date hereof. On information and belief, the fair market value of the Vehicle is approximately \$6,925.00.

ARGUMENT

Pursuant to Section 362(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such [creditor]." 11 U.S.C. § 362(d)(1). Here, the payments have not been made by the Debtor(s) under the Chapter 13 Plan.

Wells Fargo Financial Acceptance does not have, and has not been offered, adequate protection of its interest in the Vehicle. The Plan of the Debtor(s) fails to provide Wells Fargo Financial Acceptance with the indubitable equivalent of its claim. Such circumstances constitute cause, within the meaning of Section 362(d)(1), entitling Wells Fargo Financial Acceptance to relief from the stay. See Reinbold v.

Dewey County Bank, 942 F.2d 1304, 1306-07 (8th Cir. 1991) (debtor's failure to comply with plan

supports bankruptcy court's decision to grant relief from the automatic stay for cause); <u>In re Wieseler</u>, 934 F.2d 965, 967 (8th Cir. 1991) (debtor's failure to comply with stipulation provided cause for dissolving automatic stay). <u>See also First Federal Savings and Loan Ass'n. of Minneapolis vs. Whitebread (In re Whitebread)</u>, 18 B.R. 192 (Bankr. D. Minn. 1982); <u>In re Quinlan</u>, 12 B.R. 516 (Bankr. W.D. Wis. 1981); <u>In re Caulk</u>, 9 B.R. 242 (Bankr. E.D. Penn. 1981).

CONCLUSION

For all the reasons set forth herein, Wells Fargo Financial Acceptance is entitled to an order terminating the automatic stay of 11 U.S.C. § 362 and authorizing it to foreclose its interest in the Vehicle in accordance with Minnesota law.

Respectfully Submitted,

Dated: October 6, 2004 STEWART, ZLIMEN & JUNGERS

By /e/ Bradley J. Halberstadt
Bradley J. Halberstadt (#215296)
Attorneys for Movant
430 Oak Grove Street, Ste. 200
Minneapolis, Minnesota 55403
(612) 870-4100

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Dianna Lynn Smith

Debtor(s).

UNSWORN DECLARATION

FOR PROOF OF SERVICE

Bky. No. 04-30398-GFK

Bradley J. Halberstadt, an agent of Stewart, Zlimen & Jungers, attorney(s) licensed to practice law in this court, with office address of 430 Oak Grove Street, Ste. 200, Minneapolis, Minnesota 55403, declares that on the date set forth below, I served the annexed **Notice of Hearing and Motion For Relief From Stay** upon each of the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota addressed to each of them as follows:

.....

United States Trustee Suite 1015 300 South 4th Street Minneapolis, MN 55415 (Attorney for Debtor(s))
Wayne G. Nelson
5500 Wayzata Blvd, Ste. 1025
Minneapolis, MN 55416

(Trustee) Jasmine Keller 12 S 6th Street Suite 310 Minneapolis, MN 55402

(Co-Obligor)

(Debtor(s)) Dianna Lynn Smith 1871 Reaney Ave. St. Paul, MN 55119

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: October 6, 2004 Signed: /e/ Bradley J. Halberstadt

UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA

In re:	Case No. 04-30398-GFK
Dianna Lynn Smith,	Chapter 13
Debtor(s).	ORDER GRANTING MOTION FOR RELIEF FROM STAY
The above-entitled matter came before	re the Court for hearing on Monday, October 25, 2004 at the
motion of Wells Fargo Financial Acceptance	seeking relief from the automatic stay of 11 U.S.C. § 362.
Appearances were noted in the Court's record	d. Based upon the proceedings on said date, the statements of
counsel, and all of the files and records herein	n, the Court now finds that cause exists entitling Wells Fargo
Financial Acceptance to the relief requested.	
NOW, THEREFORE, IT IS HEREBY	Y ORDERED that the automatic stay of 11 U.S.C. § 362 is
immediately terminated as to Wells Fargo Fir	nancial Acceptance, and Wells Fargo Financial Acceptance is
authorized to foreclose its interest in the subje	ect 1999 Suzuki Grand Vitara, vehicle identification number
JS3TD62V8X4113048 in accordance with M	Sinnesota law. Notwithstanding Fed R. Bankr. P. 4001(a)(3),
this order is effective immediately.	
Dated:	
	Gregory F. Kishel United States Bankruptcy Judge